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SUPREME COURT, U.S.

No. 82-6075

SUPREME COURT OF THE UNITED STATES
1 First Street, N. E.
Washington, D. C. 20543

OCTOBER TERM 1982

NORMAN S. SCHLANG,
Appellant
v.
JACK HEARD,
Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPELLANT'S BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

NORMAN S. SCHLANG
419 South Main Street #6
Pasadena, Texas 77506
Tel.: (713) 472 - 4427

No. 82-6075

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Appellant

v.

JACK HEARD,

Appellee

APPELLANT'S BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

To: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

COMES now NORMAN S. SCHLANG, Appellant in the above-styled and numbered cause, and indicates to this Honorable Court that an appeal is being taken from the judgment of the United States Court of Appeals for the Fifth Circuit published on November 18, 1982, in Cause No. 82-2052, because the opinion does not conform to the factual truth. The published opinion contains falsehoods which are intended to deceive legal scholars and which pretend to justify the summary denial of an evidentiary hearing on Appellant's original verified Petition for Writ of Habeas Corpus.

BE IT REMEMBERED that the Circuit Court affirmed the summary denial of the United States District Court for the Southern District of Texas to convene an evidentiary hearing on Appellant's verified Petition for Writ of Habeas Corpus. And both the District Court and the Circuit Court went outside of the pleadings, not supplemented by pre-trial discovery proceedings, depositions or interrogatories, to find (?) "facts" upon which summary judgment was granted for Appellee Jack Heard in spite of disputed issues of material facts in the pleadings of the litigants.

Appellant has exhausted every remedy to advance and to bring to light the truth in regard to his challenge of the Constitutionality of his state court conviction. The published opinion of the Circuit Court is devious, erring, and false, and its attempt at deception, albeit successful in thwarting Appellant from overturning an unconstitutional conviction in a federal court of law necessitates the intervention of this Honorable Court to further principle and judicial integrity. Judges must not become accomplices in official lawlessness by overtly sanctioning unconstitutional convictions by means of making false "findings of fact" outside of an adversary proceeding or evidentiary hearing on a verified Petition for Writ of Habeas Corpus. Also, a most scrupulous sense of the need for historical accuracy compels the need for this Honorable Court's intervention in order that a trial be held to correct the false and misleading "findings" published in a Circuit Court document.

FALSEHOODS

1. Para. (5). "Schlang alleges that there was no indigency hearing, but the record, supplied by the State, conclusively refutes him. The court obviously concluded after hearing (and indeed said at the hearing) that Schlang was nonindigent and thus not entitled to appointed counsel or a free transcript, but the court made no written findings on the subject."

Appellant's Burden of Proof

Any evidence that Appellee may possibly have should be subjected to rebuttal and to cross-examination. Schlang has alleged that there was no indigency hearing, but the record, supplied by the State, supports this fact because it does not show a specific setting in response to his Motion for Leave to Proceed on Appeal in forma Pauperis (with supporting affidavit of indigency). Schlang has alleged that the Motion was summarily overruled, and he is supported by the court's approval of his verified Bill of Exception to the summary overruling, and by testimony adduced at a hearing (later transcribed) on Objections to the Record. The trial court did not appoint counsel or grant a free transcript, and made no written findings on the subject, although in the first two trials of the exact same cause before another judge counsel was appointed. In fact, the last trial judge appointed counsel on indigency grounds, but withdrew him when Schlang failed to enter into a plea bargained arrangement. Why do not these facts come out when the District Court and Circuit Court make "findings" on whatever the State supplies to Chambers?

2. Para. (5). "At the hearing before the trial court," ...

Appellant's Burden of Proof

The Circuit Court deceives here in suggesting and insinuating that there was a hearing on Schlang's Motion for Leave to Proceed on Appeal in forma Pauperis. There was a hearing before the trial court on Schlang's Objections to the Record, a hearing convened some eight months after the summary overruling of the Motion for Leave to Proceed on Appeal in forma Pauperis, and well past the statutory deadline for filing transcripts in the appellate record.

3. Para. (6). "Given Schlang's contumacy and the absence of any evidence of indigency," ...

Appellant's Burden of Proof

The Circuit Court continues to deceive in suggesting and insinuating that Schlang was contumacious at a hearing on his Motion for Leave to Proceed on Appeal in forma Pauperis. But in any District Court trial or evidentiary proceeding Schlang would have shown that his seemingly contumacy occurred in a hearing on Objections to the Record some eight months after the summary overruling of the Motion for Leave to Proceed on Appeal in forma Pauperis. The absence of any evidence of indigency is so erroneous because Schlang's supporting affidavit of indigency is in existence and is still available for admission into evidence if a federal court will grant him a day in trial court for him to go forth with the burden of proof.

4. Para. (9). "An initial difficulty with Schlang's claim that he was convicted on perjured testimony is that he failed to indicate what statements were allegedly false and why."

Appellant's Burden of Proof

If Schlang would have his day in a federal trial he would very likely enter into evidence a verified Bill of Exception to Conviction on the Basis of Perjured Testimony that he filed in, and was approved by, the trial court. The Bill of Exception contains the specific perjured statements that the Circuit Court didn't look hard enough to "find." And had Schlang's Motion for Court of Inquiry been granted, the proof of his

allegation of the perjury would have been amply demonstrated in factual point-by-point comparison. The key complaint, really, made by Appellant Schlang is that the overruling of the Motion for Court of Inquiry denied him the judicial forum to seek correction of the conviction had on the basis of perjured testimony, and the failure of the trial court to allow the defendant the forum to expose the ill-gotten conviction is the root of the issue in the Petition for Writ of Habeas Corpus.

5. Para. (10). "Further, Schlang does not claim that the State knowingly used the allegedly perjured testimony."

Appellant's Burden of Proof

In a habeas corpus trial or evidentiary proceeding, Petitioner would indeed have the burden of proving that the prosecutor knowingly used the perjured testimony to bring about the conviction in the third trial. Alas, when the District and Circuit Courts "tried" the habeas case in Chambers nobody asked Appellant to appear for rebuttal and cross-examination, or to "put on" or even to send in his case. From a simplified posture, it appears that the State was aware of the use of allegedly perjured testimony inasmuch as the copy of the verified Bill of Exception to Conviction on the Basis of Perjured Testimony that was approved by the trial court was submitted to the prosecution which, of course, heard its witness' different answers to material questions asked in the multiple trials of the exact same offense.

6. Para. (11). "The claim is therefore moot."

Appellant's Burden of Proof

Appellant's position is that the claim may have merit inasmuch as Schlang was ordered to serve time on a constitutionally impermissible sentence, that is, one that automatically converted court costs into additional jail time. If the sentence is constitutionally defective, a Writ of Habeas Corpus is the procedure to set it aside.

ARGUMENT

The spirit of the theory of our common law heritage and the adversary system is that the law is postulated through precedent. This means that the court consults precedent and applies it by interpretation to the facts found-either by stipulation of the parties or by the court after an evidentiary hearing (emphasis added), where the true facts are proved, and not facts invented and written in a published opinion to foster deception. Appellant herein seeks nothing more from this Honorable Court than a decision that he is entitled to a federal forum to prove, if possible, his contentions that specific constitutional rights were violated when he was convicted in state court. If Appellant can prevail, he should secure a federal Writ of Habeas Corpus. If he cannot prevail, nobody could ever say that he was not given his day in court when all the facts are presented in accordance with the rules of evidence. All the appeal to this Honorable Court is about is a day in court for this Appellant with his witnesses, proof, evidence, testimony, cross-examination of Appellee's witnesses, and rebuttal.

Respectfully submitted,

Norman S. Schlang

NORMAN S. SCHLANG
419 South Main Street #6
Pasadena, Texas 77506
Tel.: (713) 472 - 4427

CERTIFICATE OF SERVICE

Appellant NORMAN S. SCHLANG certifies that a copy of this Appellant's Brief Opposing Appellee's Motion to Dismiss was mailed to Ms. Susan Spruce, Assistant District Attorney, 201 Pannin Street - Suite 200, Houston, Texas 77002; Tel.: (713) 221 - 5816; on May 11, 1983.

Norman S. Schlang

NORMAN S. SCHLANG

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